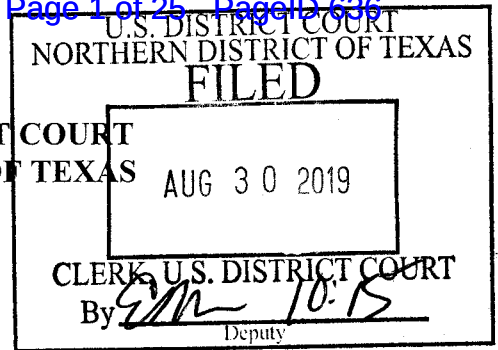


ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION



T.B., b/n/f/ JENNY BELL  
Plaintiff,

v.

NORTHWEST INDEPENDENT  
SCHOOL DISTRICT  
Defendants.

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CIVIL ACTION NO. 4:18-CV-984

PLAINTIFF'S MOTION FOR RECONSIDERATION

RESPECTFULLY SUBMITTED

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## MOTION FOR RECONSIDERATION

NOW COMES T.B. (also referred to as “Student”) by and through his next friend and mother, Jenny Bell, and files this the *Motion For Reconsideration* pursuant to Fed. R. Civ. P. 59(e). Specifically, that the Court’s *Memorandum Order and Opinion* [DE# 39] *Granting the 12(b)(1) Motion To Dismiss* filed by the *Northwest Independent School District* (hereinafter referred to “NWISD” or the “School District”) was a clear error of law, in a number of manners and particulars as more fully discussed below. Further, and if left to stand, the decision leads to a result that is manifestly unjust. In support thereof, T.B. would respectfully argue the following:

### I. PROLOGUE

1. T.B. had his arm twisted by one staff member, who also threw him against a wall and pushed him to the floor. Another staff member knocked him to the ground, kicked him in the chest and climbed on top of him, both leaving with bruising on his chest, wrists and hips. The *Memorandum Opinion And Order* [DE# 30, p. 2-3/9] authored by the Court mistakenly characterizes these facts as educational in nature. It is a characterization that is absolutely not supported in the law, *see Fry v. Napoleon Community Schools*, 137 S. Ct. 743, fn. #9 (2017) and its progeny, *see Doucette v. Georgetown Public Schools, No. 18-1160* (1<sup>st</sup>. Cir., August 26, 2019), warranting the granting of this Motion by T.B.
2. The following discussion on the topic was taken from a *conurrence* written by the Honorable Circuit Judge Kethledge in *F.H. v. Memphis City Schools*, 764 F.3d 638 (6<sup>th</sup> Cir. 2014) in a pre-*Fry* case that is even more relevant and on point today, and in this case. In quoting from this writing, we are taking the liberty of using the initials of T.B. rather than the initials of F.H. but we believe the Circuit Judge’s common sense, heartfelt language and

adherence to what are now the clear current state of the law on the topic, is absolutely applicable in this cause. It states:

“To characterize T.B.’s injuries as ‘educational’ is to belittle them. The gravamen of his claim is not that the conduct described in his complaint might reduce his SAT scores. The gravamen of his claim, rather, is that this conduct was an attack upon T.B.’s dignity as a human being. That injury was not remediable by some change to T.B.’s ‘Individualized Education Plan.’ Nor was it by a mere promise not to let these things happen again. The remedy for T.B.’s injury, therefore, lay not in ‘the IDEA’s administrative procedures[.]’ ... Instead his remedy lies in federal court, where T.B. can obtain not only compensation for his injuries, but recognition of what they actually were.”

As this Court’s decision in determining that T.B. was required to exhaust administrative remedies for all the injury claims noted in his complaint is absolutely “a clear error of law,” and the Court should grant his *Motion For Reconsideration* so as “to prevent a manifest injustice.”

## **II. INTRODUCTION AND BRIEF RESPONSE**

3. T.B. is a child with a disability. In the spring of 2017, he was verbally and physically abused on numerous occasions by District staff. He filed an *Original Complaint* [DE#1] alleging he was a victim of discrimination based upon disability pursuant to both Section 504 of the Rehabilitation Act of 1973, 29 U.S.C §794 (“Rehab Act”) and the Americans With Disabilities Act, 42 U.S.C §12131 *et seq.* He also alleged constitutional violations as contemplated by both and the Fourth and Fourteenth Amendments to the United States Constitution. The District filed a *Motion To Dismiss*, pursuant to Fed. R. Civ. P. 12(b)(1) arguing that T.B.’s case should be dismissed because he purportedly failed to exhaust administrative remedies as required by the *Individuals With Disabilities Education Act* (“IDEA”), 20 U.S.C. §1415(l). They also argued alternatively, that in any case, the case should be dismissed pursuant to Rule 12(b)(6), for “failure to state a claim.”

4. T.B. responded noting there was nothing in his *Original Complaint* that addressed IDEA, and as such, and based upon well-settled jurisprudence on Rule 12(b)(1), the District's *Motion* must be denied, as it was not ripe. Alternatively, T.B. noted that if the Court would see fit to grant said motion based upon failure to exhaust administrative remedies, then T.B. requested that he be permitted to amend his complaint. T.B. believes this request was not only a professional courtesy but a substantive due process right, that this Court, sadly ignored. This mistake by the Court itself is a "clear error of law," and the *Motion For Reconsideration* should be granted because of this failure.
5. T.B. also asked the Court, that if the 12(b)(1) was to be considered, that he be given the opportunity to address this dispositive issue on exhaustion. Surprisingly, and again, sadly, the Court failed to give T.B. the opportunity to address this crucial issue and instead summarily dismissed his case. Such an act by the Court is manifestly unjust for not just one, but two reasons. First, and most obviously, the failure to give Counsel any opportunity to address an integral legal issue to the case, especially when he specifically asked for such an opportunity, is absolutely manifestly unjust. Second, and most importantly, as the briefing on this exhaustion issue below will show, the Court's decision was absolutely a clear error of law.
6. As the Court committed a clear error of law, and acted in a manner that was manifestly unjust, T.B.'s *Motion For Reconsideration* should be granted. Further, he asks that he be permitted to amend his complaint and respond to a surely forthcoming motion to dismiss whether reliant upon Rule 12(b)(1) or 12(b)(6) or both. As such, and with all this in mind. T.B. proceeds accordingly.



## **II. FACTUAL RESUME**

7. T.B. was born on March 21, 2006. He is now 13 years old and has been diagnosed with *Autism Spectrum Disorder* and *Attention Deficit Hyperactivity Disorder* (“ADHD”). [DE# 19, ¶11]. As the facts more fully describe below, these disabling conditions caused T.B. to be cognitively impaired such that he did not function at grade level. Additionally, he also had a number of behavioral issues that over the course of time required him to be removed from class, restrained and put in a cool down room by staff. He was not considered normal by staff. [DE# 19, ¶16, 18, 20].
8. In and around February of 2017, T.B.’s paraprofessional—Kenneth Burt, forcefully grabbed him, twisted his arm behind his back, pushed him forcefully up against the wall and also forcefully pushed him down to the floor, significantly injuring him in the process. [DE# 19, ¶18-19].
9. On or about April 4, 2017, T.B.’s teacher, Laura Adams, knocked him to the ground, dragged him through two classrooms, and climbed on top of him. Then, as T.B. ran back and forth in a complete panic, Adams also kicked him in the chest. He suffered bruising from the kick. Additionally, he had bruising on his wrists and hips from being dragged around, as well. The incident on April 4, 2017 was captured on video. Mother requested a copy of the video. Staff refused. Now would they permit her to see the video. Due to the second round of harassment incidents and NWISD’s actions and inactions the various effects of the bullying and harassment T.B. received at the hands of Burt and Adams had significantly worsened. Before the incidents, T.B. primary exhibited a positive demeanor; now his overall demeanor is hopeless and depressed. [DE# 19, ¶29-33].

### **III. PROCEDURAL RESUME**

#### **A. THE ADMINISTRATIVE PROCEEDINGS**

10. T.B. filed a complaint with the Texas Education Agency arguing that the District failed to provide him an *Individualized Educational Plan* (“IEP”) commensurate with his unique and individualized needs. He also alleged the District violated his rights pursuant to Section 504 and the ADA, as well as the United States Constitution. [DE# 4, p. 144-171]. The Hearing Officer determined that T.B. did not file his complaint with the TEA in a timely manner. [DE# 4, p. 004- 011].

#### **B. THE FEDERAL APPEAL OF THE TEA DECISION**

11. T.B. has appealed that order and it is currently set at 4:18-cv-985<sup>1</sup> and awaits briefing on the topic.

#### **B. THE FEDERAL INJURY CASE**

12. T.B. filed his *Original Complaint* [DE# 1]. The District filed a *Motion To Dismiss*, pursuant to Fed. R. Civ. P. 12(b)(1) arguing that T.B.’s case should be dismissed because he purportedly failed to exhaust administrative remedies as required by the IDEA, 20 U.S.C. §1415(l). They also argued that the case should be dismissed pursuant to Rule 12(b)(6) for “failure to state a claim.” In his response T.B. noted there was nothing in his *Original Complaint* that addressed IDEA, and as such, the Rule 12(b)(1) *Motion* should be denied, as it was not yet ripe. T.B. asked the Court for the ability to amend his complaint. He also asked that if the Court did want to consider it the exhaustion issue, he be given permission

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<sup>1</sup>. If the Judge in that Court finds that the TEA Hearing Officer, erred, whether it be in total or in part, and the case is remanded back to the TEA, the Court’s current order on the topic be rendered as moot or nullity, and in any case should be vacated. Alternatively, this Court this Court abate the case pending the outcome of that decision.

to address it.

C. THE COURT'S MEMORANDUM ORDER

13. The Court granted the School District's *Motion To Dismiss* on failure to exhaust claims and dismissed the entire case in "one fell swoop." [DE# 30]. The Court did not even address T.B.'s request he be given the opportunity to amend his complaint, and opportunity to respond to the District's *exhaustion* arguments.
14. In any case, the Court first looked to Marc V. v N.E. Indep. School District, 455 F.Supp. 2d 577, 592 (W.D. Tex. 2006)<sup>2</sup> for the proposition that "IDEA bars plaintiffs from circumventing its administrative exhaustion requirement by asserting under a different statute that claims that could have been brought thereunder.
15. The Court also looked to Fry v. Napoleon Community Schools, 137 S. Ct. 743, 755-756 (2017) to support its position. First it noted that a reviewing Court is to determine the "gravaman" of the Plaintiff's complaint. In this analysis a Court asks whether (1) the plaintiff could have brought essentially the same claims at a public facility that was not a school and (2) whether an adult at the school could have pressed essentially the same grievance. asking or alluding to one of the "hints" noted in the Fry decision.
16. The Judge also noted that:

"... plaintiff alleges he was a student with a disability, and that he was denied a safe and non-hostile educational environment, and services he needed, such as a

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<sup>2</sup>. This case was authored by the Honorable District Judge Xavier Rodriguez, the same Judge who also penned Pagan-Negron v. Seguin Indep. Sch. Dist., 974 F. Supp. 2d 1020, 1028 (W.D. Tex. 2013). a case where he found that exhaustion was not necessary. A few points. Most importantly, in Marc V. the family had gone through exhaustion and lost, and then attempted to repackage their obvious IDEA claims which had failed as different claims under 504 and the ADA. Judge Rodriguez was not fooled. Alternatively in Pagan the 504 and ADA claims were based upon injuries at school, and not a re-packaged IDEA claim. As more fully described below T.B.'s case is more akin to Pagan and not Marc V.

psychological assessment, school-based counseling and social skills training, and aide or shadow to observe him at school. In other words, he was denied appropriate and necessary accommodations as a student with a disability. Specifically, he suffered a 'loss of equal educational opportunities' as those afforded non-disabled students."

Under the Fry test, it is clear the gravamen of plaintiff's complaint is the denial of FAPE (a free appropriate public education). His claim could not have been brought outside of the school. Additionally, that his claims were based upon his status as a student at the school, and could not have been by an adult at the school, alluding to second "hint" in Fry both leading to the result that the claim was educationally based requiring exhaustion. The Court further relied upon J.W.'s comment that damages included "loss of educational opportunities." [DE# 34, p. 16-17/38] also as evidence his claim was based upon educational issues requiring exhaustion."

17. T.B. respectfully disagrees and files this his *Motion For Reconsideration* accordingly.

#### **IV. ISSUES FOR RECONSIDERATION**

T.B. ALLEGED HE WAS PHYSICALLY ABUSED BY HIS TEACHERS. THE COURT DETERMINED THAT THE VARIOUS CAUSES OF ACTION BASED UPON SUCH ABUSE REQUIRED HIM TO GO THROUGH ADMINISTRATIVE EXHAUSTION AS CONTEMPLATED BY 20 U.S.C. 1415(l).

DID THE COURT COMMIT A CLEAR ERROR OF LAW BY NOT PERMITTING T.B. TO FILE AN AMENDED COMPLAINT?

Yes!

DID THE COURT COMMIT AN ERROR OF LAW BY NOT PERMITTING T.B. THE OPPORTUNITY TO RESPOND TO THE DISTRICT'S EXHAUSTION ISSUE BEFORE RULING ON THE ISSUE?

Yes!

DID THE COURT COMMIT AN ERROR OF LAW WHEN DETERMINING THAT T.B. WAS REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES?

Yes!

WAS PERMITTING THE CASE TO BE SUMMARILY DISMISSED MANIFESTLY UNJUST?

Yes!

## **V. STANDARD OF REVIEW**

18. Federal Rule Of Civil Procedure 59(e) permits a party to *Alter Or Amend A Judgment* within 28 days after such judgment is entered. The Court may grant a timely motion for reconsideration “for any reason that would justify granting one on a party’s motion.” Fed. R. Civ. P. 59(d). Such reasons include “a clear error of law or to prevent manifest injustice.” ING Global v. United Parcel Serv. Oasis Sup., 757 F.3d 92, 96-97 (2<sup>nd</sup> Cir. 2014). T.B. reasonably believes that in light of the facts and procedural resume noted above relative to the operative law cited below, the Court committed a substantive error of law in granting the School District’s *Motion For Summary Judgment* on this exhaustion issue. Moreover to let this decision remain would be a manifestly unjust to T.B. This request is not brought for purposes of delay but rather so that justice may be better served.

## **VI. ARGUMENT AND AUTHORITIES**

19. Plaintiffs incorporate by reference, as if fully set forth herein, all the above noted paragraphs, as if fully set forth herein, and additionally, each following paragraph incorporates the paragraphs and sections before it.
- A. THE COURT COMMITTED A CLEAR ERROR OF LAW BY NOT PERMITTING T.B. TO AMEND HIS ORIGINAL PETITION
20. It is well-settled that leave to amend should be granted is generally within the sound discretion of the district court. Lyn-Lea Travel Corp. v. American Airlines, Inc., 283 F.3d 282, 286 (5th Cir.), *cert. denied*, 537 U.S. 1044, 123 S. Ct. 659, 154 L. Ed. 2d 516 (2002) [*quoting Quintanilla v. Texas Television, Inc.*, 139 F.3d 494, 499 (5th Cir. 1998)]. However, Federal Rule of Civil Procedure 15(a) also make it clear that the trial court is required to grant leave to amend “freely.” Id. In fact, the language of R. 15 evidences a bias and

predisposition in favor of granting leave to amend. Courts in this circuit have determined that the purpose of the bias in favor of allowing amendment of the pleadings is to assist the disposition of the case on its merits, and to prevent pleadings from becoming ends in themselves. Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 598 (5th Cir. 1981).

21. Moreover, while leave to amend should not be granted automatically, the trial court should always err on the side of allowing an amendment. Addington v. Farmer's Elevator Mutual Insurance Co., 650 F.2d 663, 666 (5th Cir. 1981), *cert. denied*, 454 U.S. 1098, 102 S. Ct. 672, 70 L. Ed. 2d 640 (1982); Laber v. Harvey, 438 F.3d 404, 426-427 (4<sup>th</sup> Cir. 2006)[amendment is not prejudicial if it merely adds theory of recovery to facts already pled and offered before discovery has occurred]; Harrison v. Rubin, 174 F.3d 249, 253 (D.C. Cir. 1999) [permitting amendment that clarifies legal theories].;
22. Last “[A] motion for leave to amend should not be denied unless there is [*quoting Foman v. Davis*, 371 U.S. 178 (1962)] “undue delay, bad faith or dilatory motive on the part of the Movant, repeated failure to cure deficiencies by amendments previously allowed [or] undue prejudice to the opposing party by virtue of allowance of the amendment.” U.S. ex rel. Willard v. Humana Health Plan of Texas Inc., et al., 336 F.3d 375, 386 (5th Cir. 2003).
23. T.B. has not acted in bad faith, nor has he delayed the proceedings nor has he a dilatory motive. Further, granting T.B.’s *Motion For Reconsideration* giving him permission to amend his complaint, would not unduly prejudice Defendants and in fact to do otherwise, is a clear error of law, would unfairly prejudice T.B. and be manifestly unjust thereby.
- B. THE COURT COMMITTED A CLEAR ERROR OF LAW BY NOT PERMITTING T.B. THE OPPORTUNITY TO RESPOND TO THE DISTRICT’S EXHAUSTION ISSUE BEFORE RULING ON THE ISSUE?

24. T.B. asked the Court for permission to address this dispositive issue and it was not provided. Such *sua sponte* dismissals are not favored. Knight v. Mooring Capital Fund, LLC, 749 F.3d 1180, 1190 (10<sup>th</sup> Cir. 2014); *see also* Williams v. City of Chicago, 733 F.3d 749, 755 (7<sup>th</sup> Cir. 2013)[non-moving party must be given opportunity to respond and present argument]. The Court committed a clear abuse of discretion and error of law.

C. DID THE COURT COMMIT AN ERROR OF LAW WHEN DETERMINING THAT T.B. WAS REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES?

25. The School District argues that T.B. complaint should be barred for failure to exhaust administrative remedies. In doing so they substantially rely upon the Supreme Court's decision in Fry v. Napoleon Community School, 137 S. Ct. 743 (2017). In doing so they fail to note that in footnote #9 of the decision the Court wrote:

"The school districts offer another example illustrating the point. They suppose that a teacher, acting out of animus or frustration, strikes a student with a disability, who then sues the school under a statute other than the IDEA. *See* Brief for Respondents 36-37. Here too, the suit could be said to relate, in both genesis and effect, to the child's education. *But the school districts opine* (emphasis added) we think correctly, that the substance of the plaintiff's claim is unlikely to involve the adequacy of special education—and thus is unlikely to require exhaustion...."

This Court likewise failed this clear and absolute directive by the Supreme Court.

26. As will be more fully cited below, it is now well-settled that when a school staff member injures a child there is no need to exhaust claims under the IDEA. In fact, not only F.H. v. Memphis City Schools noted above in T.B.'s *Prologue*, but other previous case law in this circuit and district also supports this proposition. In fact, in Dabney v. Highland Park Elementary School Dist., No. 3:15-CV-2122-l; 2016 WL 1273467 at \*16-17 (N.D. Tex., March 31, 2016) the Court wrote:

"The IDEA should not be construed so broadly any injury a disabled student suffers



in school is automatically subject to the IDEA." Pagan-Negron v. Seguin Indep. Sch. Dist., 974 F. Supp. 2d 1020, 1028 (W.D. Tex. 2013)<sup>3</sup>. Accordingly, when a plaintiff alleges a "pure discrimination claim" or "non-education injuries" cannot "be redressed by the IDEA's administrative procedures and remedies," the IDEA exhaustion requirement does not apply. Id.

27. Specifically the following all support Judge Rodriguez' distinction between an IDEA based case like Mark V. and one that is not: see Tristan v. Socorro Independent School Dist., 902 F. Supp. 2d 870, 879-80 (W.D. Tex. 2012) [physical assault not related to educational programs; "[I]t would be absurd to interpret the [IDEA] as placing restrictions on a disabled student seeking redress for constitutional torts, when such restrictions would not apply if the same claims were brought by his non-disabled classmates."]; Deshotel v. West Baton Rouge Parish School Bd., 937 F. Supp. 2d 826, 831 (M.D. La. 2011) [remedies under IDEA only provide prospective educational benefits; exhaustion not required in case of abusive use of restraints]; P.R. v. Central Texas Autism Center, 2009 U.S. Dist. LEXIS 43303,, at \* 20-22 (W.D. Tex. May 15, 2009) [where Plaintiff not complaining about educational issues but seeks monetary damages for physical injuries and emotional anguish, exhaustion not required] and R. J. v. McKinney Indep. Sch. Dist., No. 4:05-CV-257, 2005 U.S. Dist. LEXIS 39470, at \*22-\*23 (E.D. Tex. Dec. 29, 2005) [... hearing officer cannot award money damages for non-educational injuries and would be futile for student to exhaust claims]. Morris v. Dearborne, 181 F.3d 657, 674 (5<sup>th</sup> Cir. 1999) [there is no provision in IDEA to

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<sup>3</sup>. In Pagan-Negron, the Honorable District Judge Xavier Rodriguez in this case noted the distinction between his decision in the Marc V. and that case. Specifically, the Judge noted the child's claim was based upon abuse and did not allege deprivation of certain educational services, nor did mother seek remedies that were educational in nature or available under the IDEA. Nor did Pagan-Negron challenge her child's placement or related educational services; instead she seeks only tort-like damages in the form of physical pain, mental anguish, medical expenses, and mental health expenses, which are claims for relief not available under the IDEA. It is exactly what T.B. has requested in this case.



address atrocities regarding sexual abuse].

28. Moreover, there is substantial and significant pre-Fry caselaw across many circuits and federal district courts, that when a student is the subject of injuries, intentional, accidental or not, such acts of physical injuries do not require exhaustion. *See F. H. v. Memphis City Sch.*, 764 F.3d 638, 645 (6th Cir. 2014) [in case involving special needs student who alleged abuse over a period of time, concluding that where "the gravamen of [the] complaint is the verbal, physical, and even sexual abuse of [the plaintiff] by his aides," the factual allegations did not implicate the IDEA; (Kethledge, concurring) ["The gravamen of [the plaintiff's] claim . . . is that this conduct was an attack upon [his] dignity as a human being. That injury was not remediable by some change to [his] Individualized Education Plan."]; Muskraat v. Deer Creek Pub. Schs., 715 F.3d 775, 785 (10th Cir. 2013) [where the plaintiffs alleged "scattered instances of potential battery" that may have "resulted from simple frustration with [the student] rather than any legitimate disciplinary goal," finding exhaustion not required and stating "we do not believe the child's parent must request a 'no random violence' clause in the [individualized education plan]"; Moore v. Kansas City Public Schools, 828 F.3d 687 (8th Cir. 2016) [... where student was sexually abused, noting that references in the complaint to the defendant's failure to address the student's tendency to wander and vulnerability to suggestion and abuse, does not change the gravamen of the action to one concerning educational rights or denial of a FAPE; "We agree with the Ninth Circuit that "[n]on—IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA" *citing Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 871

(9th Cir. 2011) (en banc), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162, 1166, 1171 (9th Cir. 2014) (en banc); *McCormick v. Waukegan Sch. Dist. #60*, 374 F.3d 564 (7th Cir. 2004) [... the IDEA provided no remedy for permanent physical injuries that a student with a metabolic disorder suffered when a PE teacher required him to run laps and do pushups.]; *F.H. ex rel. Hall v. Memphis City Schools*, 764 F.3d 638 (6th Cir. 2014) [holding that exhaustion not required when plaintiff brings section 1983 claims predicated on verbal, physical, and sexual abuse]; *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000) [holding that a disabled student who suffered a fractured skull and exacerbation of a seizure disorder when she was placed in an unsupervised windowless closet did not need to exhaust because the claim was brought "solely to redress" the physical injuries and was outside of the scope of IDEA"]; *Franklin v. Frid*, 7 F. Supp. 2d 920, 925 (W.D. Mich. 1998) [excluding "random acts of violence" from IDEA exhaustion requirement] and *Hough v. Shakopee Public Schools*, 608 F. Supp. 2d 1087 (D. Minn. 2009) [finding that Fourth Amendment unlawful search claim did not require exhaustion of administrative procedures because "plaintiffs' assertions with respect to the effect of the searches on their education" were peripheral to the claim].

29. Caselaw subsequent to *Fry*, also supports T.B.'s position in similar cases across the country. *See Doucette v. Georgetown Public Schools*, No. 18-1160 (1<sup>st</sup> Cir., August 26, 2019); *P.G. v. Rutherford Cty. Bd. of Educ.*, 313 F. Supp. 3d 891 (M.D. T.N.-Nashville Division, May 29, 2018) *citing* and relying upon the following: *Considine-Brechon v. Dixon Pub. Sch. Dist. #170*, 2017 U.S. Dist. LEXIS 87942, 2017 WL 2480751, at \*4-5 (N.D. Ill. June 8, 2017) [*citing Fry*, 137 S. Ct. at 756]; *E.H. v. Neal*, 2018 U.S. Dist. LEXIS 93001 (M.D. Tenn. Apr.

16, 2018) [*citing Fry* and observing that the plaintiffs' ADA and Rehabilitation Act claims based on a single strike to the face of an autistic child allegedly causing psychological harm "focus[ed] on whether [the] strike denied [the student] *access* (emphasis added) to public education programs as opposed to the specific nature or quality of those programs under [the IDEA]"); accordingly, the Court concludes that the allegations are "beyond the scope of a FAPE . . . in the school context."]; Gosch v. Sergeant Bluff-Luton Cmty. Sch. Dist., 244 F. Supp. 3d 904, 921-23 (N.D. Iowa 2017) [applying *Fry*, finding claims that involved "subjecting [student] to unwarranted and unnecessary physical force" or concerned "unlawful and unreasonable use of physical force" are wrongs beyond the scope of the denial of a FAPE under the IDEA, and excusing exhaustion]; Daniels v. Indep. Sch. Dist. No. 001., 2018 U.S. Dist. LEXIS 79232, 2018 WL 2145009, at \*3 (W.D. Okla. May 9, 2018) [noting *Fry*, concluding that Section 1983 claim based upon allegations of abuse and harassment of autistic student by teacher and students does not allege denial of a FAPE, and finding "no basis for concluding that there is an IDEA claim . . . at issue ..."]; Condit v. Bedford Cent. Sch. Dist., 2017 U.S. Dist. LEXIS 171701, 2017 WL 4685546, at \*9 (S.D. N.Y. Oct. 16, 2017) [under *Fry*, differentiating between claims regarding bullying causing trauma (the basis for the plaintiff's suit) that did not require IDEA exhaustion and hypothetical claims that the plaintiff's parents were displeased with the content of the student's education]; Hurd v. Clark Cty. Sch. Dist., 2017 U.S. Dist. LEXIS 162691, 2017 WL 4349231, at \*4 (D. Nev. Sept. 29, 2017) [applying *Fry* and holding that allegations of physical abuse of three special education students by teacher "does not seek redress for the school's failure to provide a FAPE . . . [and] would be actionable whether the conduct occurred at a non-school public

facility or against adults"]; Bowe v. Eau Claire Area Sch. Dist., 2017 U.S. Dist. LEXIS 61496, 2017 WL 1458822, at \*5 (W.D. Wis. Apr. 24, 2017) [considering the Fry hypotheticals and determining that the injuries alleged by the autistic plaintiff, including physical assault, were "a general-purpose barrier to all of the benefits of school, not just the custom-designed [individualized education program] that the IDEA provides"] and among others Gm v. Lincoln Cty. Sch. Dist., 2017 U.S. Dist. LEXIS 101161, 2017 WL 2804996, at \*4 (D. Ore. Apr. 21, 2017) [under Fry, where non-verbal special needs student alleged pain and distress from unequal seclusion, finding that "[w]hile such treatment could certainly affect the quality of one's education, the harm plaintiff describes could exist even if his education was top notch. Plaintiff alleges discrimination, not inadequate individualized educational services, and thus his claims fall outside the IDEA."].

30. Specifically, as all the above help crystallize the issue and the correct question for this Court, is this a case about "bare allegations of violence (attributed to discrimination) ... untethered from the core of a [student's] educational program" *citing* P.G. v. Rutherford County Board of Education, 313 F. Supp. 3d 891 (M.D. Tenn. 2018) or is it not? It is self-evident that this case is about "bare allegations of violence" not T.B.'s IEP.

31. As the Court's decision granting the School District's argument T.B. was required to exhaust administrative remedies is "a clear error of law, ING Global v. United Parcel Serv. Oasis Sup., 757 F.3d 92, 96-97 (2<sup>nd</sup> Cir. 2014), the Court should grant his *Motion For Reconsideration* to prevent a manifest injustice.

B. THE TWO HINTS ARE INAPPLICABLE AND EVEN IF THEY ARE APPLICABLE T.B. CAN DEMONSTRATE THEY BOTH WORK TO HIS FAVOR

32. A review of footnote #9 in Fry notes that a:

“..... *telling indicator* of that conclusion is that a child could file the same kind of suit against an official at (emphasis added) another public facility for inflicting such physical abuse—as could an adult subject to similar treatment by a school official. To be sure, the particular circumstances of such a suit (school or theater? student or employee?) might be pertinent in assessing the reasonableness of the challenged conduct. But even if that is so, the plausibility of bringing other variants of the suit indicates that the gravamen of the plaintiff’s complaint does not concern the appropriateness of an educational program....”

33. It is sure that T.B. could have filed a complaint against a City Police Department or County Sheriff’s Department, based upon Section 504 or the ADA, if an officer had both unnecessarily and excessively tased him at a theater or public library. Waller v. City of Danville, 556 F.3d 171, 174 (4<sup>th</sup> Cir. 2009); Gorman v. Batch, 152 F3rd 907 (8<sup>th</sup> Cir. 1998). As such, exhaustion would not be required in such a circumstance.
34. Similarly the second “hint” also works to T.B.’s favor. If he has been past 18 years old but still in public school, as permitted under IDEA, and he was physically abused by staff, he surely would still have a viable claim against the school.
35. Similarly, an adult visiting the school, or a teacher, if that person for instance was having a mental health breakdown at the school, and was injured by a staff person in the course of addressing that outburst, *see* P.G. v. Rutherford at 89224 \*26, would have a viable cause of action under Section 504 or the ADA, *see* Hainze v. Richards, 207 F.3d 795, 799 (5<sup>th</sup> Cir.2000), and would not require exhaustion..
36. In fact, and T.B. wrote above, the issue of the damages based upon failure to provide educational services as the same extent as provided non-disabled student, could also apply to adults. Again, a student with a disability who was 18 years old and was injured by a staff member would certainly have a loss of educational opportunities. So would an adult taking, for instance, evening classes at the school, who was injured by a staff member.

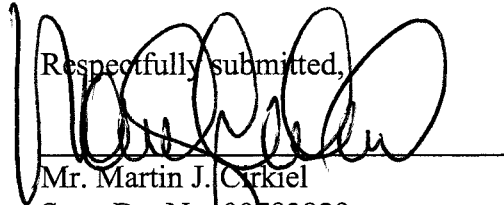
37. Additionally, under Special Education Law if a parent who is at the School District attending, for instance an Admission, Review & Dismissal (“ARD”) Committee Meeting at the school, had a mental health and/or behavioral meltdown, and was tased by a School Police or Resource Officer, that adult would suffer a loss of an educational opportunity also. Winkelman v. Parma City Sch. Dist., 550 U.S. 516 [The IDEA mandates that educational agencies establish procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education (“FAPE”)]. 20 U.S.C. §1415(a)].
38. In summary, the two *hints* noted in Fry help T.B. not the School District.
- C. THE MENTION OF EQUAL ACCESS TO EDUCATION DOES NOT CHANGE A TORTBASED CLAIM IN AN IDEA CLAIM
39. The Memorandum Opinion relies upon T.B.’s complaint where he alleges he suffered a “loss of educational opportunities” [DE# 30, p. 8] as evidence that the gravamen of his complaint is IDEA based and not abuse based. The reliance upon this phrase is misplaced as importantly, a loss of, or an effect upon, the educational opportunities of T.B. is an element of recovery for all school based injury claims, including those related to Title IX, *see Davis ex el. LaShonda D v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999) for this proposition whether it be under Title IX of the Educational Acts of 1972; for or a claim where there is discrimination based upon race, nationality or religion pursuant to Title VI of the Civil Rights Acts of 1964 at a school; *see Fennell v. Marion Independent School District*, 804 F.3d 398, 410 (5<sup>th</sup> Cir. 2015) and especially one must also show a deprivation of educational opportunities when alleging discrimination based upon disability at a school; *see also S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453-56 (6th Cir. 2008) [element of disability

discrimination claim is loss of educational opportunities.]. In short, this statement that the Court relies upon, has nothing to do with T.B.'s IEP, Special Education services or the delivery of FAPE to him. Moreover, and again, to the extent there is any ambiguity as to this phrase related to damages, it's inferences inures to the benefit of T.B. not the School District at this stage of the litigation.

## **VII. CONCLUSION AND PRAYER**

WHEREFORE PREMISES CONSIDERED Plaintiffs urge that their *Motion For Reconsideration* be granted in total and alternatively, in part; P.G. v. Rutherford at 89224 \*31-32 [requiring exhaustion on some claims and not on others]; J.A. v. Corpus Christi ISD, 2018 U.S. Dist. LEXIS 158823 \*7-8 (S.D. TX., Corpus Christi Division, September 18, 2018) [Court striking as superfluous certain facts and claims] such that claims based upon the physical abuse of T.B. be permitted to proceed; and in addition and also in the alternative the Court withdraw its *Memorandum and Opinion* in this cause, pending the adjudication of the appeal in Cause No. 4:18-cv-985; that T.B. be permitted to amend his complaint, and for such other relief as this Court deems just and proper, whether it be in law or in equity or both.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 27 day of August 2019, I sent the foregoing documents to the Clerk of Court by hand-delivery FEDEX with email notice provided to Defendants, and also to be electronically provided to the following CM/ECF system participant upon filing:

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